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JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 182

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner.

Petition for Rehearing

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November 15, 1956

AIR MAIL

Honorable Earl Warren
Chief Justice of the United States
Supreme Court
Washington, D. C.

Re: Allendorf vs. Elgin, Joliet and
Eastern Railway Company - No. 182

My Dear Mr. Chief Justice:

Subsequent to the preparation [illegible] I was requested by one

Subsequent to the preparation [illegible] rehearing in the above entitled cause, I was requested by one of the student editors of the Harvard Law Review to furnish him with a set of the briefs and printed record in this case for consideration of the case as the subject of a comment in Harvard Law Review. Today I have received a similar request from the Law School of Yale University, with the advice that since they regard the case as "one of legal significance" it has been selected for argument in the Yale Moot Court of Appeals during the 1957 spring term.

We believe that this expression of interest evidenced so promptly after the opinion was reported supports our view, urged in the petition for rehearing, that the issues in the case are of far greater significance than the impact of the decision upon the immediate parties to the litigation. For that reason, I take the liberty of calling these facts to your attention for such consideration by the Court as you may see fit to afford them.

Yours very truly,

Harlan L. Hackbert

HLH/mt
cc: William H. Dege[illegible], Esq.
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Minneapolis, Minnesota

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Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully petitions this court for a rehearing of the denial of its petition for certiorari on October 8, 1956. In support of such petition for rehearing your petitioner submits that the court has misapprehended or overlooked the important and far-reaching implications of the decision below (1) upon the constitutional issue of the right of a state to regulate by legislation the jurisdiction of its courts, a question which the court below decided in

a way probably not in accord with applicable decisions of this court, and (2) the substantive issue of the proper measure of damages in an action for wrongful death under the Federal Employers' Liability Act, an issue which the court below decided in a manner in conflict with decisions upon the same or related issues in other reviewing courts, and in a way probably not in accord with applicable decisions of this court. We respectfully submit that the conflict of the decision below on the constitutional question with the decision of this court in *Missouri ex rel Southern Ry. Co.* v. *Mayfield,* 340 U. S. 1, and the decisions of state courts of last resort following the *Mayfield* decision and the conflict of far-reaching practical importance between the decision of the court below on the question of the proper measure of recoverable damages and the decisions of this court, the courts of appeal for the Sixth, Seventh and Eighth Circuits, and the reviewing courts of the several states in which there are scores of decisions on the issue which arises in every litigated FELA wrongful death action, are squarely presented by this record, and in the interests of obtaining an authoritative resolving of the conflicts should be settled by a decision of this court.

The consistent trend of this court's rulings adverse to railroad defendants in FELA cases has been made the subject of scholarly research and report in a note in 69 Harvard L. Rev. 1441. Notwithstanding the appearance of even-handed treatment of these cases in Mr. Justice Douglas' "account for our stewardship in this group of cases" in his concurring opinion in *Wilkerson* v. *McCarthy,* 336 U.S. 53, at 68, the blunt fact of the matter is that from the 1938 term through the 1954 term, this court denied every petition by the railroad defendants raising the question of the submission of the case to the jury save

one, which was subsequently dismissed as improvidently granted, while 46.2% of the petitions filed by employees were granted, a percentage just double the average for the same period. Of the 36 cases which were decided by this court the judgment below in favor of the railway defendant was affirmed in only 5 cases, and in no instance did the successful defendant obtain the concurrence of more than five members of the court. During that period four justices of the court voted against the railway defendant in every case. 69 Harvard L. Rev. at 1446. During this entire period only one employer's petition for certiorari was granted, and the cause decided by this court. That was the *Mayfield* case, *supra*. The decisions at the 1955 term followed the established pattern: 7 employees' petitions out of 12 filed were allowed; in 3 the judgment for the defendant below was reversed in the order granting certiorari; one petition of 12 filed by railroad defendants was allowed. That was *Southern Pacific Co.* v. *Gileo*, 76 S. Ct. 952, and the decision of the court in that as well as the other 2 cases decided at the 1955 term by written opinion were adverse to the railroads. So far at the 1956 term, 3 employees' petitions have been granted; all defendants' petitions have been denied.

We concede that an important function of this court is to protect the constitutional rights of individuals to a trial by jury when their proof makes out a *prima facie* case, as well as their right to the protection of the Fifth Amendment and the right of freedom of assembly and free speech on religious and political issues. This court has been vigilant to protect the rights of FELA plaintiffs, of persons suspected of or charged with subversive activity, and of the militant religious sect known as Jehovah's Witnesses. But the Constitution of the United States is

more than a guarantee of individual liberties; it is a charter between the several states for the establishment of a federal government and for the division of the powers of government between the states and the federal government. The Tenth Amendment is no less important a part of the Constitution than is the Supremacy Clause. In practical application, the questions arising under the Tenth Amendment transcend in importance the questions arising under the constitutional provisions guaranteeing individual liberty for the latter issues seldom directly affect anyone other than the litigants themselves, while the questions of state power under the Tenth Amendment affect all citizens of the states. A citizen of a state has a vital interest in the maintenance of his individual constitutional rights, but collectively those citizens have an even greater interest in the protection of the rights and privileges reserved to the states by the Tenth Amendment.

The first significant question presented by this case is not whether Mrs. Allendorf is entitled to retain the judgment which she obtained in the Circuit Court of Cook County, Illinois, or whether she must try her case again in one of the two courts in which she filed timely actions to protect herself against an adverse ruling on the jurisdictional question here. The question is the power of a state to protect its courts from the burden of litigation imported from beyond its boundaries. The very real and practical interest which the state has was well set forth by Judge Robson in *Morris* v. *Pennsylvania R. Co.*, 10 Ill. App. 2d, 24 at 38, who, in speaking of the evil of the out-of-state solicitation of an FELA case and its importation into Cook County in the hope of "the larger settlement or ver-

dict that can be obtained if suit is filed here" said on page 38:

> "It has been estimated that the overall cost of operating a courtroom with a jury in Cook County is approximately $800 per day. The average time required to try a law jury case is two and one-half days. However, in actions involving substantial damages and severe injuries, trials of from one to two weeks are not uncommon. Thus not only does such out of state litigation add to the case load of our courts but the taxpayers of this state must assume the burden of paying the expenses of litigation for nonresidents. It is, therefore, clearly apparent that solicitation not only brings the legal profession into disrepute, but it also increases the burden of expense in operating our courts and is one of the principal factors creating the overwhelming backlog of negligence cases, which results in litigants waiting about four and one-half years for a trial in the Circuit and Superior Courts of Cook county.
>
> "The existence of these evils is not new. They have repeatedly been commented upon in other jurisdictions. (See State Bar Journal of California, Volume 6, No. 4, page 79. See *In re Bar Ass'n of City of New York,* 222 App. Div 580, 227 N.Y. Supp. 1.)"

The truth of Judge Robson's observation is confirmed by an inspection of the trial calendar for the assignment judge for the combined Circuit and Superior Court jury calendar in Chicago as of the day when the preparation of this petition for rehearing was commenced. That trial call of 308 cases listed 17 cases filed in 1950 or prior years, 141 cases filed in 1951, and 123 cases filed in the first months of 1952. There were but 27 cases filed in subsequent years, which for one reason or another had been advanced for earlier trial.

If the *Mayfield* case points out one of the rare "questions important to the enforcement of the Federal Employers Liability Act by the courts of the states" which

justifies the grant of certiorari at the petition of the employer, we submit that this case involves a question of similar importance. There is an irreconcilable conflict between the holding of the court in the *Mayfield* case that the *judicial* branch of a state government may adopt a rule of *forum non conveniens* which closes the court of that state to out of state FELA litigation and the decision of the court below that the *legislative* branch of the state government may not by a statute adopt a similar rule. Although the decision of this court in the *Mayfield* case, as well as in *Douglas* v. *New York, N.H. and H.R. Co.*, 279 U.S. 377 and *Ex parte Collett*, 377 U.S. 55, and the decisions in the several states following the *Mayfield* case, cited at pages 11 and 12 of the petition for certiorari, were strongly urged in our briefs below, those decisions are not mentioned or distinguished or shown to be inapplicable in the opinion of the Illinois Supreme Court. Of necessity, therefore, courts in other states which look to the decisions for a guide as to the power of a state, whether by statute or judicial decision, to refuse to entertain out of state FELA litigation are left without any guide as to the applicable rule. We submit that either the *Mayfield* case is wrong or the decision of the court below is wrong, and that in view of the extensive transportation of FELA cases from all over the country to a relatively few centers of litigation as shown by the statistics summarized at page 4 of petitioner's reply brief here, the question whether any federal policy protected by the Supremacy Clause purports "'to force a duty' upon the state courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse' "—and "controlling the abuses of imported litigation" is such a "valid excuse" (see 39 Yale L. Jour. 388)—is a question which must occur again and again and which should be settled authoritatively and finally by this court. In recent years

in one aspect or another the question has been presented to this court in *Miles* v. *Illinois Central R. Co.,* 315 U.S. 698; *Ex parte Collett,* 337 U.S. 55; *Kilpatrick* v. *Texas & Pacific Ry. Co.,* 337 U.S. 75, and in the *Mayfield* case, 340 U.S. 1. The conflict between those decisions of this court and the decision below is one which should be resolved now and for all time.

If *Southern Pacific Co.* v. *Gileo,* 76 S. Ct. 952, sets the other condition upon which an employer's petition for certiorari should be granted by this court, we submit that the second question presented by this record meets that test. In the *Gileo* case, seventeen years after the the adoption of the 1939 amendment and its redefinition of "interstate commerce," this court finally granted certiorari to decide the scope and meaning of that redefinition, an issue which had been raised in scores of decisions in the federal courts of appeal and the reviewing courts of the states. Without undertaking to tabulate all of the cases, we may say that in at least four of our appeals during this period that issue was a decisive issue in the case. Finally, this court granted certiorari because the consolidated cases "involve interpretation of an important federal statute governing railroad employer obligations to its injured employees." 76 S. Ct. at 955.

The question of the measure of recoverable damages in a wrongful death action under the Federal Employers' Liability Act is one which arises in every such action whether tried in a state court or federal district court. The case reports today are replete with decisions involving one phase or another of the questions presented by this record: the use of gross earnings as against "take home pay" in determining the employee's pecuniary contributions to his dependents, the right to introduce evidence or argue to the jury or request instructions as to

the impact of federal income taxes and wage withholdings, the use of work expectancy rather than life expectancy in projecting the loss of earnings or loss of pecuniary contributions into the future, the right of an actuarial witness to testify to calculations made by him on the basis of definite amounts of earnings and precise periods of time, and finally the effect of the attainment of maturity by minor dependents. Whereas other cases often present only particular aspects of these problems, this record presents the problem in its entirety. Here again is a question constantly arising in these cases upon which there are conflicting rulings in various jurisdictions. If the decision below stands, the state courts in Cook County will apply one rule as to the admission of actuarial evidence and the scope of arguments and instructions to the jury, while the federal district courts sitting only three blocks away must follow the very different rules prescribed by the Court of Appeals for the Seventh Circuit in *Wetherbee* v. *Elgin, J. & E. Ry. Co.*, (C.A. 7) 191 F. 2d 302. We submit that if the decision below is not clearly wrong with respect to the actuarial evidence under the decisions of this and other federal appellate courts, then the question is "an important question of federal law which has not been, but should be, settled by this court."

For the foregoing reasons, and to settle the constantly recurring questions which are fully and inescapably presented by this record, we submit the order denying the petition for certiorari should be vacated, that certiorari should be granted and the cause heard, and the questions should be resolved and decided by this court.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

Certificate.

The undersigned certifies that this petition for rehearing is presented in good faith and not for delay, and that in his opinion the petition for rehearing states circumstances of substantial or controlling effect which, although previously available to petitioner, were not previously presented in their present form or, apparently, in adequate manner to disclose to the court the importance of the issues here presented.

HARLAN L. HACKBERT
Attorney for Petitioner